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DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MONTANA

IN THE MATTER OF Inquiry by the Montana Public Service Commission into its Implementation of the Public Utility Regulatory Policies Act of 1978	))))))	**COMMENTS OF LEO WIND, LLC, MONTANA MARGINAL ENERGY, INC., JUHL ENERGY, INC., LINDSAY WIND, LLC, EVERPOWER WIND HOLDINGS, LLC AND HYDRODYNAMICS, INC.** Docket No. N2015.9.74

INTRODUCTION

LEO Wind, LLC, Montana Marginal Energy, Inc., Juhl Energy, Inc., Lindsay Wind Development, LLC, EverPower Wind Holdings, LLC., and Hydrodynamics, Inc. (collectively "QF Commenters") acting by and through undersigned counsel, hereby submit their comments pursuant to the Montana Public Service Commission's ("Commission") notice of Commission Action ("NCA"), dated December 2, 2015. In particular, the Commission's NCA specifically sought comments on the following issues:

> The Commission reiterated its Notice of Inquiry and directed parties to address the symmetrical treatment of QF and utility-owned resources. Specifically, for each proposal listed below, parties should explain whether and how utility-owned resources would be treated in a similar manner if the Commission were to adopt such a proposal for QFs:

A. Reduce the length of QF contracts (e.g., re-evaluate plant usefulness based on value to consumers rather than a cost-of-service-based revenue requirement);

B. Maintain a preference for competitive solicitations (e.g., ensure that utility-owned resources must participate in and be selected through a comparable process);
C. Further reduce rates for energy and capacity to reflect the lower capacity value and other operating characteristics of intermittent technologies (e.g., similarly discount the value of utility-owned intermittent resources in planning and preapproval dockets;
D. Approve interim integration rates (e.g., adjust revenue requirements to reflect more accurate integration cost information as it becomes available based on further study); □ Offer small QFs escalating instead of levelized rates (e.g., using escalating annual revenue requirements);
E. Exclude all CO2 costs from market price forecast(s) and account for all environmental attributes through RECs (e.g., exclude CO2 costs from utility planning and preapproval dockets); and
F. Implement a bright-line LEO test such as Texas' '90-day Rule' (e.g., require similar readiness for any utility proposal as a minimum filing requirement for preapproval filings).

Montana's "Mini-PURPA" law requires the Commission to "encourage" long-term QF contracts "in order to enhance the economic feasibility of [QFs.]". Mont. Code. Ann. § 69-3-604. The Commission requested additional comments on the meaning of "long-term," and how to ensure consumer indifference in the context of this mandate.

NCA, at p.2

These comments will hopefully clarify QF Commenters' positions on these issues, and they will be addressed in the order presented above.

II. COMMENTS

The inquiry necessarily begins by a resort to the statutory law. The Public Utilities Regulatory Policy Act of 1978 ("PURPA"), 16 U.S.C. § 824-a(3)(b)(2), et seq. ("PURPA") expressly prohibits discrimination against QFs in terms of rates. This does not mean that state commissions charged with implementing PURPA may discriminate against qualifying facilities or "QFs" in other ways, i.e., by treating QFs in a disparate and unfair manner to non-QF generators. First, PURPA was enacted to "encourage" the development of QFs:

> In order to overcome the first of these perceived problems, § 210(a) directs FERC, in consultation with state regulatory authorities, to promulgate "*such rules as it determines necessary to encourage cogeneration and small power production*," including rules requiring utilities to offer to sell electricity to,

> and purchase electricity from, qualifying cogeneration and small power production facilities. Section 210(f), 16 U. S. C. § 824a-3(f), requires each state regulatory authority and nonregulated utility to implement FERC's rules. And § 210(h), 16 U. S. C. § 824a-3(h), authorizes FERC to enforce this requirement in federal court against any state authority or nonregulated utility; if FERC fails to act after request, any qualifying utility may bring suit.

FERC v. Miss., 456 U.S. 742, 751 (1982) (emphasis added).

The Commission has, in fact, adopted FERC's rules which it is required by law to implement. In addition, the Montana legislature has enacted Montana's "Mini-PURPA," M.C.A. §§ 69-3-601 through- 604, which expressly includes the following standards for establishing contract terms and conditions in the event of a dispute:

> (1) The commission shall determine the rates and conditions of the contract for the sale of electricity by a qualifying small power production facility according to the standards in subsections (2) through (5).
> (2) Long-term contracts for the purchase of electricity by the utility from a qualifying small power production facility must be encouraged in order to enhance the economic feasibility of qualifying small power production facilities.
> (3) The rates to be paid by a utility for electricity purchased from a qualifying small power production facility must be established with consideration of the availability and reliability of the electricity produced.
> (4) The commission shall set these rates using the avoided cost over the term of the contract.

M.C.A. § 69-3-604(1) -(4).

In sum, the Commission has the obligation to "encourage" long-term contracts to "enhance the economic feasibility" of QFs. In light of these foregoing considerations, the QF commenters will address each of the issues posed by the Commission in order.

A. WHETHER THE COMMISSION SHOULD REDUCE THE LENGTH OF QF CONTRACTS (E.G., RE-EVALUATE PLANT USEFULNESS BASED ON VALUE TO CONSUMERS RATHER THAN A COST-OF-SERVICE BASED REVENUE REQUIREMENT.

18 C.F.R. § 292.304(d) states:

> **(d)** *Purchases "as available" or pursuant to a legally enforceable obligation.* Each qualifying facility shall have the option either:
> **(1)** To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or
> **(2)** To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
> **(i)** The avoided costs calculated at the time of delivery; or
> **(ii)** The avoided costs calculated at the time the obligation is incurred.

If a QF has incurred a legally enforce obligation (a "LEO"), the rate for purchases, at its option, is to be calculated over a specified term from the date the obligation is incurred. The unanswered question is which entity chooses the term of that obligation? It makes sense that the opinion of the developer of the QF project's opinion would carry the most weight, as it is plain that utilities are often, at best, "unenthusiastic" about purchasing power from QFs and thus may not wish to adopt contract terms and conditions which will encourage QF development as required by PURPA. As Judge Colins put it in *Lehigh Valley Power Committee* v. *Pennsylvania Public Utility Com.*, 128 Pa. Commw. 259, 266 n. 10, 563 A.2d 548, 1989 Pa. Commw. LEXIS 475 (Pa. Commw. Ct. 1989)

> *Utilities are hostile to non-utility generation.* Utilities earn a return only on their property which is used and useful in producing and delivering power. The utilities earn no return on costs, such as those incurred to purchase fuel or power from other sources such as QFs. The enactment of PURPA flowed from the awareness that utilities are hostile to non-utility generation since such generation is clearly in competition with the utilities and displaces generation plant the utility would add to rate base, or power purchases from sister utilities.

(Emphasis added). In other words, utilities have no incentive to ease the path for development of QFs, as QFs are competitors to serve customers that the utilities would otherwise serve with rate-based generation upon which they receive a rate of return. The more QFs that sell to a utility the fewer opportunities for utilities to earn a return on selling power to their customers.

FERC indirectly addressed this issue in the Preamble to its Implementing Regulations, often referred to as Order 69:

> Paragraphs (b)(5) and (d) are intended. to reconcile the requirement that the rates for purchases equal the utilities' avoided cost with the need for qualifying facilities to be able to enter into contractual commitments based. by necessity, on estimates of future avoided costs. Some of the comments received regarding this section stated that if the avoided cost of energy at the time it is supplied is supplied is less than the provided in the contract or obligation, the purchasing utility would be required to pay a rate for purchases that would subsidize the qualifying facility. The Commission recognizes that possibility, but is cognizant than in other cases the requisite rate will turn out to be lower than the avoided cost at the time of purchase. . .. Many commenters have stressed the need for certainty with regard to return on investment in new technologies. The Commission agrees with these latter arguments, and believes that. in the long run, "overestimations" and "underestimations" of avoided cost will balance out. . .. The import of this section is to ensure that a qualifying facility which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as the result of changed circumstances.

45 Fed. Reg. 12, 214, 12, 224 (1980) (hereafter "FERC Order 69").

Thus, FERC's policy was that developers of new technologies would have the certainty of a return on their investment. Contracts of shorter duration than 10-15 years will not likely attract interest from the lenders and investors who wish to ensure certainty in their returns. In addition. reducing the length of the agreements such that there is an obligation to renegotiate these agreements multiple times over the length of the life of a QF project will cause investors to worry about what new contract terms and conditions will be imposed.

Moreover, the risk of utility investment as opposed to QF purchases for ratepayers is already asymmetrical. If a utility has an underperforming asset. it can and will seek an increase in costs from ratepayers associated with that asset. If a QF project under performs, it must live with its contract, and failing to abide by that contract may result in any number of legal consequences, including breach of contract and consequential damages.

Furthermore, utilities do not invest in capital intensive projects on a short-term basis and it makes no sense for them to do so. Utilities must make investments on behalf of their ratepayers as they have an obligation to serve. Reducing debt service on a utility-owned project by extending the years of the payoff works much the same that a 25-year mortgage works for a homeowner. Having shorter-term contracts raises the risk premium that lenders will charge in order to reduce the exposure of their investment in the project. Similarly, QF investment in new technologies requires, just as it does for utilities, longer-term contracts such that the debt service for the project is spread out over a number of years.

Another factor not to be overlooked is that traditional renewable energy financing relies in large part on the Investment Tax Credit and the Production Tax Credit. A typical QF financing structure will pay off the tax equity investors over the first ten years of the project. If the Commission were to adopt QF contracts any shorter than 10 years in length, it will eliminate traditional QF financing options (or at a minimum, severely reduce them).

The point that FERC made in Order 69 should not be lost on the Commission. Many QF contracts, necessarily based on estimates of future avoided costs, will sometimes result in contracts that pay the QF more than a current avoided cost estimate at any given point in time over the life of the agreement. However, there will also be many times, and there are significant examples, where QF contracts will pay the QF substantially less than current market. Longer QF contracts serve as a hedge against spikes in energy prices and real inflation. With currently very low energy markets (historically speaking), entering long-term QF contracts now would be a substantial hedge against future energy prices.

Although the point may be well known to the Commission, once long-term contracts have been signed, the Commission may not take actions to reduce or otherwise adjust the price to

be paid to the QFs. *E.g., Freehold Cogeneration Assocs., L.P. v. Board of Regulatory Comm'rs*, 44 F.3d 1178, 1194 (3d Cir.1995) ("Finally, we hold that once the BRC approved the power purchase agreement between Freehold and JCP&L on the ground that the rates were consistent with avoided cost, just, reasonably, and prudentially incurred, any action or order by the BRC to reconsider its approval or to deny the passage of those rates to JCP&L's consumers under purported state authority was preempted by federal law").

There is also the matter of Montana's mini-PURPA which requires the use of "long-term" agreements between QFs and utilities in order to enhance the economic feasibility of QFs. Nothing in Montana's mini-PURPA implies, much less states, that continual use of shorter-term agreements as a substitute for longer-term agreements would be permissible.

Perhaps what the Commission means to say is that the rate in a QF contract should be based on rates that vary over time with estimates of avoided cost. If so, 18 C.F.R. §292.304(d)(2) already provides a QF with the ability to sell its generation "on as available" basis once they have incurred a LEO. However, the QF is also given the choice to sell its generation based on rates fixed at the time the LEO is incurred over a specified term. Under PURPA, The Commission may not adopt rules that deprive a QF of its right to a fixed price contract based on estimated future avoided costs.

In conclusion, the public policy behind PURPA and all sources of authority support the use of "long-term" contracts for QF developers. The developers and investors are in the best position to know how long these obligations should be in order to attract capital and earn a reasonable return on investment. Precisely how long these commitments should not be subject to a hard-and-fast rule, except that the QF should always have the option of choosing a 20 to 25-year contract length. If the QF developer chooses a shorter term, that should be their option. But

to hamstring QF development with short-term contracts or revisiting contract terms over a longer obligation period would not only reduce investment in renewable technologies and increase transaction costs for QFs, but it would also violate PURPA. There is no need to address QF contract length. There is no evidence whatsoever that QF contract length is a problem. Before the Commission decides to solve a problem, there should be some evidence there is a problem. The Commission does not need to adjust QF contract length.

B. WHETHER THE COMMISSION SHOULD MAINTAIN A PREFERENCE FOR COMPETITIVE SOLICITATIONS (E.G., ENSURE THAT UTILITY-OWNED RESOURCES MUST PARTICIPATE IN AND BE SELECTED THROUGH A COMPARABLE PROCESS).

As a general rule, QF Commenters are not opposed to using competitive solicitations for two purposes: (1) to set a benchmark for avoided costs; (2) to promote development of QF generation in competition with utility resources. This is provided, however, that five conditions are met as part of the competitive solicitation process: (1) that utility owned generation may only be selected as part of that solicitation process in the same fashion as QF contracts; (2) that either the Commission or some non-utility public entity solicits the proposals, conducts the solicitation, and selects the winners; (3) that all sources must compete in the same solicitation, such that a true bench mark for avoided costs and an apples-to-apples comparison of resource types can be fairly made, including externalities; (4) that such solicitations are regularly held such that new projects do not languish and die waiting for new solicitations; and (5) that in between competitive solicitations, the Commission make available an opportunity by which a QF may sell its power to a utility based on a long-term forecast of avoided cost rates as consistent with FERC's decision in *Hydrodynamics, Inc., Montana Marginal, Inc. and WINData, LLC*, 146 FERC ¶ 61,193, PP. 30-32 (March 20, 2014). In that order, FERC stated:

> In *Grouse Creek*, the Commission found that the Idaho Commission's requirement that a QF file a meritorious complaint to the Idaho Commission before obtaining a legally enforceable obligation "would both unreasonably interfere with a QF's right to a legally enforceable obligation and also create practical disincentives to amicable contract formation. Similarly, we find that requiring a QF to win a competitive solicitation as a condition to obtaining a long-term contract imposes an unreasonable obstacle to obtaining a legally enforceable obligation particularly where, as here, such competitive solicitations are not regularly held.

Id. at P. 32.

QF Commenters are not opposed to fair, regularly held, and openly conducted competitive solicitations. But the Commission must ensure that all resources are acquired that way, that there is no bias in favor of utility resource selection, and that proposals are openly and fairly evaluated. To do otherwise would risk further discrimination against Montana's QF community, and there has been enough of that already.

C. WHETHER THE COMMISSION SHOULD FURTHER REDUCE RATES FOR ENERGY AND CAPACITY TO REFLECT LOWER CAPACITY VALUE AND OTHER OPERATING CHARACTERISTICS OF INTERMITTANT TECHNOLOGIES (E.G., SIMILARLY DISCOUNT THE VALUE OF UTILITY-OWNED INTERMITTENT RESOURCES AND IN PLANNING AND PRE-APPROVAL DOCKETS).

QF Commenters are confused by this question as they believe the QF-1 rates are already substantially discounted for capacity value and their energy rates are already discounted based on their intermittent output. These assumptions have been historically included in every QF-1 avoided cost docket. QF Commenters do believe utility resources should be subject to equivalent treatment. However, QF Commenters also wish to state that NorthWestern Energy's resistance as Balancing Area operator to using various inter-hour scheduling options could substantially alter the capacity contribution of intermittent resources, and would also likely lower

reliance on integrating resources such as Dave Gates Generating Station. Why the Commission has yet to require NorthWestern Energy to implement these measures is unclear.

D. SHOULD THE COMMISISON APPROVE INTERIM INTEGRATION RATES (E.G., ADJUST REVENUE REQUIREMENTS TO REFLECT A MORE ACCURATE INTEGRATION COST INFORMATION AS IT BECOMES AVAILABLE BASED ON FUTHER STUDY).

NorthWestern Energy has, for years now, attempted to impose through filings before the Commission interim rate reductions on QFs whenever it projects a reduction in its avoided costs. However, when NorthWestern Energy knew or should have known its avoided costs were increasing, it did not attempted to immediately implement an increase in its QF-1 rate. *See* Dockets D2003.7.86, D2004.6.96, and D2005.6.103, wherein it took the Commission approximately 3 ½ years to approve an increase in the QF-1 rate from NorthWestern Energy's proposed rate of $32.75 to $49.90. This has led the QF community to be suspicious of NorthWestern Energy's interim rate filings.

However, the question is whether the Commission has the authority to even consider interim rate adjustments to the integration rate. In *Montana Power Co. v. Mont. Pub. Serv. Com'n* 671 P.2d 604, 611 206 Mont. 359, 371 (1983), the Montana Supreme Court decided the Commission lacked express or implied power to enjoin on its own motion a reorganization plan for a regulated utility. In doing so, the Court summarized the state of the law regarding the Commission's authority:

> In general, property devoted to public use or to a use in which the public has an interest can be controlled by the public for the common good. *State ex rel. Mt. States T. & T. Co. v. District Court* (1972), 160 Mont. 443, 447, 503 P.2d 526, 529. In Montana, public utilities are regulated by the Public Service Commission through the exercise of powers granted by the Legislature. "[T]he Commission is a creature of, owes its being to, and is clothed with such powers as are clearly conferred upon it by statute." *Great Northern Utilities Co. v. Public Service Com'n.* (1930), 88 Mont. 180, 203, 293 P. 294, 298. The Commission has no inherent common law powers. *City of Polson v. Public Service Commission*

> (1970), 155 Mont. 464, 473 P.2d 508. "It has only limited powers, to be ascertained by reference to the statute creating it, *and any reasonable doubt as to the grant of a particular power will be resolved against the existence of the power. Collier on Public Service Companies*, 404-405." *State v. Boyle* (1921), 62 Mont. 97, 102, 204 P. 378, 379.

(emphasis in original). As a result, there must be *some* statutory source for the Commission's assertion of the power to adopt interim integration rates for QFs.

There also does not appear to be any statutory authority for the assertion of such a power by the Commission as to QF's under M.C.A. § 69-3-304, which reads as follows:

> The Commission may, in its discretion, temporarily approve increases or decreases pending a hearing or final decision. If the final decision is to disapprove an increase, the Commission may order a rebate to all consumers for the amount collected retroactive to the date of the temporary approval. If the final decision is to disapprove a decrease, the Commission may order a surcharge to be paid by all consumers for the amount not collected retroactive to the date of temporary approval.

Nothing in this statute authorizes a temporary change in interim integration rates. The statute repeatedly uses the word "consumer" and does not reference generators or other suppliers, much less proposed payments to or by QFs.

Nor do any other statutes provide the Commission with the express authority to approve interim integration rates for QFs. Efforts by other state commissions to adjust downward the rates paid by utilities to existing QFs through various procedural mechanisms have been struck down. *See E.g., Connecticut Valley Elec. Co., Inc. v. F.E.R.C.*, 208 F.3d 1037 (D.C. Cir. 2000) (upholding FERC decision declining to retroactively revoke QF certification for QFs selling in excess of net output); *Independent Energy Producers Ass'n*, 36 F.3d at 855 (9th Cir. 1994) (California Public Utility Commission program permitting utilities to terminate QF contracts with QFs that purportedly did not meet federal standards and paying less than full avoided cost to those facilities preempted by PURPA). Although these decisions do not reflect rates paid by a

QF to a utility, they nonetheless are an adjustment to the net amount of revenue a QF may receive.

Nor does any regulation appear to grant the Commission express authority to temporarily adjust integration rates on an interim basis. In fact, the regulation implementing the Commission's statute authorizing interim rate approvals, M.C.A. § 69-3-304, appears to contemplate that interim rate approvals will accompany general rate cases. A.R.M. § 38.5.502(1) specifically states that a prerequisite to an interim rate increase request is that the "application for an interim grant of authority to increase utility rates . . . be filed in conjunction with a permanent rate case proceeding." No such permanent rate case proceeding as contemplated by A.R.M. § 38.5.502(1) has been filed related to costs of integration.

In addition, there is no authority granted under the Commission's mini-PURPA regulations that provide the Commission with authority to adopt interim integration rates. A.R.M. §§ 38.5.1901 -1908 do not even mention interim rate approvals. That the Montana mini-PURPA regulations are silent on this score is consistent with Montana's statute governing interim rate approvals, M.C.A. § 69-3-304, and its regulations, both of which only speak to consumer impacts in general rate cases.

The only possible basis, then, for the Commission's authority to adopt interim integration rates would be a contention that the Commission has the implied authority to do so. As set forth above, it is dubious that such authority can be inferred from the relevant existing Commission statutes and the regulations implementing those statutes. If there is a doubt as to the existence of such authority, such doubt is to be construed against the Commission's exercise of such power. *Montana Power Company*, 206 Mont. at 371, 671 P.2d at 611.

Prospective QFs may be discouraged – as opposed to encouraged – by the Commission permitting interim integration adjustments. There has been a substantial amount of certainty regarding the continuing justification for the current WI-1 integration rates, and whether NorthWestern Energy is consistently applying those rates to all energy suppliers (wholesale and QFs) and to its own generation. The interim rate approval mechanism was never intended to be used as a mechanism whereby a utility could use its economic clout to exact rate concessions from prospective QFs or prevent QF development in Montana.

E. OFFER SMALL QFS ESCALATING INSTEAD OF LEVELIZED RATES (E.G., USING ESCALATING AND REVENUE REQUIREMENTS);

QF Commenters believe the Commission has the authority to not offer levelized rates, but the question is whether this is good public policy. If the total stream of payments is the same, why would it matter whether the Commission afforded QFs the opportunity to receive a levelized payment? The only argument might be that higher payments in the early years of a long-term contract might encourage a QF to default, but the lending obligations and power purchase obligations are such that, realistically, developers have little incentive to simply walk away from their obligations under their QF agreements. Between paying for breach of contract damages and attorney's fees, as well as potential collateral litigation with investors and lenders, the QF that chose to breach an obligation because of a levelized contract would face a slew of potentially costly consequences.

Again, what problem is the Commission trying to address by eliminating an option for levelized rates? It does not appear that in the history of Montana's implementation of PURPA that developers have breached their obligations under levelized or partially-levelized agreements. So before addressing a problem, the Commission should decide if there actually *is* a problem. If

the purpose of eliminating levelized contracts is simply to impede, interfere or obstruct QF development, this would seem to run contrary to the purposes of PURPA, FERC's implementing regulations and Montana's mini-PURPA. Whether it would rise to the level of the Commission failing to "encourage" QF development is a hypothetical question, but by attempting to solve a non-existent problem and making it more difficult for QF developers to obtain financing it would not appear that the Commission would be attempting to "encourage" QF development in Montana.

F. EXCLUDE ALL C02 COSTS FROM MARKET PRICE FORECASTS AND ACCOUNT FOR ALL ENVIRONMENTAL ATTRIBUTES THROUGH RECS (E.G., EXCLUDE CO2 COSTS FROM UTILITY PLANNING AND PREAPPROVAL DOCKETS.

This has been another position continuously advocated by NorthWestern Energy and it is an invitation to error. If carbon costs are real (and NorthWestern Energy assumed they were for purposes of its own resource development and acquisition planning, i.e., acquiring PPL Montana's hydroelectric resources, which the Commission approved), eliminating carbon costs from avoided cost calculations is discriminatory and violates PURPA and FERC's implementing regulations. 16 U.S.C. § 824-a3(b)(2) and 18 C.F.R. § 292.304. The utility cannot treat its own calculation of resource acquisition cost in such a radically different method than it does for QF avoided cost calculations. To be clear, the markets for renewable energy credits or "RECs" is a completely different market than will be the market for avoided carbon costs. RECs are creatures of state law, designed to encourage utility investment in renewable energy facilities. Avoided carbon costs are costs that are associated with implementing a national program of reduced carbon emissions, which, under the Clean Power Plan, the states will be charged with

administering. The states have the option of setting up their own carbon emission offset trading program, or relying on one that will be established by the federal government.

It makes no sense to exclude carbon costs from utility planning and preapproval dockets because these carbon costs may be one of the most, if not the most important, factors in determining what resources the utility chooses to invest in and which resources the Commission ultimately approves. To exclude carbon costs from a calculation of avoided costs (whether they be for utility planning purposes and investment or avoided costs) would be like excluding the location of a business from a consideration of whether it was a good investment decision.

G. IMPLEMENT A BRIGHT-LINE LEO TEST SUCH AS TEXAS' 90-DAY RULE (E.G., REQUIRE SIMILAR READINESS OF ANY UTILITY PROPOSAL AS A MINIMUM FILING REQUIREMENT FOR PREAPPROVAL FILINGS).

Texas did in fact implement a 90-day rule as a precondition to a QF project being able to force a utility to purchase its generation. This policy was allowed to pass without comment by FERC under the Bush Administration when Texas QFs filed an implementation challenge. Ultimately, the United States Court of Appeals for the Fifth Circuit upheld the Texas 90-day rule in its *Power Resource Group* decision. First, QF Commenters would note that Montana does not have the same PURPA implementation scheme as Texas. Montana's mini-PURPA and the Commission's implementing regulations do not, at present, permit such an approach. Second, it is also a fact that no other jurisdiction has adopted Texas' approach to creating a LEO, and FERC has made consistent pronouncements in recent decisions which cast doubt on the ultimate validity of the Texas approach. Third, the Commission should also be mindful that whatever else it may be, the United States Court of Appeals for the *Ninth* Circuit, has jurisdiction over

federal courts in Montana. The Fifth Circuit's decision is not binding in Montana and there is a substantial question whether the Ninth Circuit would view the issues in the same way.

RESPECTFULLY SUBMITTED THIS 23RD DECEMBER, 2015

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